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No. 88-124

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the court's jurisdiction under 28 U.S.C. Section 1337?

B. Whether a union member who claims that his union breached its duty of fair representation by engaging in discriminatory job referrals may maintain an action against his union in Federal District Court notwithstanding the absence of an affirmative allegation that an employer breached a collective bargaining agreement?

C. Whether a union's discriminatory refusal to refer its member to jobs constitutes "discipline" within the meaning of the Labor Management Reporting and Disclosure Act and whether a union member's claim brought pursuant to the Labor Management Reporting and Disclosure Act dealing with discriminatory job referrals is pre-empted by the jurisdiction of the National Labor Relations Board?

PARTIES TO PROCEEDINGS BELOW

Lynn L. Breininger, plaintiff-appellant below and petitioner herein, is and was a member of Sheet Metal Workers International Association Local Union No. 6 since he entered its apprenticeship program in 1949.

Sheet Metal Workers International Association Local Union No. 6, defendant-appellee below and respondent herein, is a labor organization representing journeymen and apprentice sheet metal workers and a party to a multi-employer collective bargaining agreement covering the Toledo, Ohio area and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.

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CITATIONS TO OPINIONS BELOW

The March 1, 1988 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is sought to be reviewed was originally not recommended for publication in accordance with its Local Rules. On June 15, 1988, the United States Court of Appeals for the Sixth Circuit granted a motion for publication of its March 1, 1988 decision. The decision has been published and the citation is 849 F.2d 997 (6th Cir. 1988). Said decision has been set forth in the Separate Appendix to the Petition for Writ of Certiorari filed July 20, 1988 at Appendix A, pp. A1 to A3.

The prior opinion of the United States District Court for the Northern District of Ohio, Western Division, in Case No. C83-1126 is an unreported decision and has been set forth in Appendix B at pp. A4 to A11.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 1, 1988. On March 15, 1988, petitioner filed a timely petition for rehearing before the United States Court of Appeals for the Sixth Circuit. In its Order filed on April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied petitioner's petition for rehearing. On July 20, 1988, petitioner filed a timely Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Said Petition was granted on February 21, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. SECTION 1337

Section 1337. Commerce and antitrust regulations: amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, that the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 U.S.C. Section 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 U.S.C. Section 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 U.S.C. Sections 1581 et seq.].

29 U.S.C. SECTION 158b(1)(A)

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. Section 157]: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein:

29 U.S.C. SECTION 159. REPRESENTATIONS AND ELECTIONS

(a) *Exclusive representatives-Employees adjustment of grievances directly with employer.* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. SECTION 411(a)(5)

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A)

served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. SECTION 412. CIVIL ACTION FOR INFRINGEMENT OF RIGHTS; JURISDICTION

Any person whose rights secured by the provisions of this title [29 U.S.C. Section 411 et seq.] have been infringed by any violation of this title [29 U.S.C. Section 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. SECTION 529. PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATION

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provision of section 102 [29 U.S.C. Section 412] shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Petitioner challenges the judgment entered March 1, 1988, of the United States Court of Appeals for the Sixth Circuit which affirmed a dismissal by the United States District Court for the Northern District of Ohio Western Division of petitioner's First Amended Complaint which

alleged (1) that the Sheet Metal Workers International Association Local Union No. 6 (hereinafter "Local 6") breached its duty of fair representation by engaging in discriminatory job referrals to petitioner's detriment, by refusing to refer petitioner to a job site despite an employer's request, and by refusing to process charges filed by petitioner relating to job referrals under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association; and (2) that the said Local 6 engaged in the above described conduct because of petitioner's previous support of unsuccessful candidates for business manager and business agent as part of said local's widespread, improper "discipline" for political opposition in violation of 29 U.S.C. Section 411(5), 29 U.S.C. Section 412 and 29 U.S.C. Section 529. (See First Amended Complaint; R. 4).

Petitioner filed his First Amended Complaint in the United States District Court for the Northern District of Ohio, Western Division on April 3, 1984. The First Amended Complaint contained two separate counts. The First Count invoked the Court's jurisdiction for respondent's alleged breach of the duty of fair representation pursuant to 29 U.S.C. Sections 151, 158(b), and 159. In his First Amended Complaint, petitioner Breininger specifically noted, with respect to the duty of fair representation claim, that no corresponding breach of contract by an employer was included and that, therefore, federal jurisdiction was being asserted under 28 U.S.C. Section 1337. (See First Amended Complaint Jury Demand Endorsed Herein at p. 1; R. 4). In the Second Count of his First Amended Complaint, petitioner invoked the Court's jur-

isdiction pursuant to 29 U.S.C. Sections 411, 412, and 529, the Labor Management Reporting and Disclosure Act of 1959, as amended.

Subsequent to filing his First Amended Complaint, discovery then ensued in the District Court. Discovery included documentary discovery, depositions of plaintiff, and depositions of David Williams and Michael Duffey, then officers of respondent Local 6. (See Deposition of Michael Duffey filed 11/19/86; R. 24: Deposition of David Williams filed 11/19/86; R. 25: Deposition of Lynn L. Breininger filed 12/11/86; R. 28). Petitioner also subpoenaed from Northwestern Ohio Administrators Association records of Health and Welfare contributions made by employers on behalf of individual members of Local 6. (Opposition of Plaintiff to motion filed 9/10/86 with Exhibits, Composite Exhibit I; R. 26).

On September 10, 1986, respondent Local 6 filed a Motion for Summary Judgment and/or In the Alternative to Strike Jury Demand (R. 23). In moving for summary judgment, the respondent Local 6 contended that jurisdiction over plaintiff's First Amended Complaint was preempted in its entirety by the exclusive jurisdiction of the National Labor Relations Board. Alternatively, the respondent Local 6 contended that it did not violate 29 U.S.C. Section 411(5) and Section 529 with respect to making hiring hall referrals in that such discrimination would not constitute "other discipline" within the meaning of the Labor Management Reporting and Disclosure Act. The respondent Local 6 additionally contended that a jury right was not available to petitioner on either claim. Petitioner Breininger opposed the motion of respondent

Local 6 for summary judgment in all respects. (Opposition of plaintiff to motion filed 9/10/86 with Exhibits; R. 26).

In its opinion and order filed on February 20, 1987, the United States District Court for the Northern District of Ohio, Western Division granted respondent Local 6's Motion for Summary Judgment on jurisdictional grounds. (Opinion and Order and Judgment; R. 29, 30). The District Court based its Opinion and Order exclusively on its finding that the National Labor Relations Board has exclusive jurisdiction over hiring hall referrals in that they constitute an unfair labor practice under Sections 8(b)(1)(A) and 8(b)(2) of the NLRA. Therefore the Court dismissed petitioner's claims solely on jurisdictional grounds and held that the remainder of respondent's Motion for Summary Judgment and/or In the Alternative to Strike Jury Demand was moot and denied. (Opinion and Order filed February 20, 1987; R. 29). Thereafter on March 10, 1987, petitioner filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit (Notice of Appeal; R. 31). After briefing on the merits and oral argument, the United States Court of Appeals for the Sixth Circuit, in a *per curiam* opinion, affirmed the opinion of the District Court in all respects. (See Appendix A, pages A1-A3 of Appendix to Petition for Writ of Certiorari). In its March 1, 1988 opinion, the Sixth Circuit held that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRA. Therefore, the Sixth Circuit reasoned, NLRA fair representation claims must be brought before the NLRA. Moreover, the Sixth Circuit held that petitioner's LMRDA claim was without merit because petitioner did not demonstrate that he was

properly "disciplined" within the meaning of the LMRDA. On March 15, 1988, petitioner Breininger filed a timely Petition for Rehearing before the Sixth Circuit. (Petition for Rehearing; R. 13). This Petition was denied by the Sixth Circuit without further opinion. (Order Petition for Rehearing Denied; R. 14). On July 20, 1988, petitioner Breininger filed his Petition for a Writ of Certiorari with this Court.

Petitioner Breininger was a long time member of the respondent Local 6 and entered respondent's apprenticeship program in 1949. (Deposition of Lynn L. Breininger, p. 15; R. 28). In fact, Breininger had served as a steward on a couple of occasions. (Deposition of Lynn L. Breininger at pp. 20-21; R. 28). Petitioner testified that one contract covered all sheet metal contractors in the jurisdiction of Local 6. (Deposition of Lynn L. Breininger, p. 27; R. 28). The applicable contract refers to the areas including Toledo, Ohio and the Counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock, Seneca in Ohio and Monroe and Lenawee Counties in Michigan. (J.A. 25, 26). In Article V of the multi-employer contract, it was specifically noted that employers agreed to confirm in writing to respondent Local 6 when requesting employees. (J.A. 29). David Williams, then business manager, testified in his deposition that the letter of request language was inserted in the Contract in 1980. (Deposition of David Williams at p. 10; R. 25).

Breininger testified in his deposition that when an employer requests an employee by name, the union attempts to obtain a written letter from the contractor verifying their request. Mr. Breininger added that there were

times when the then business agent and/or business manager Messrs. Duffey and Williams, did not do that. (Deposition of Lynn L. Breininger at pp. 35 and 36; R. 28).

In paragraph 6 of his First Amended Complaint, petitioner Breininger alleged that on April 6, 1983, Venderbush Industrial Corporation, a contractor from the outside of the respondent Local 6's jurisdiction, specifically requested petitioner's presence at the Enrico Fermi Power Unit Job No. 2657 in Newport, Michigan, on Monday, April 9, 1983. (Deposition of Lynn L. Breininger at pp. 56-66; R. 28). David Williams, then business manager of respondent, admitted that the Fermi job site was in the jurisdiction of Local 6. (Deposition of David Williams at p. 8; R. 25). Breininger testified that an out-of-jurisdiction contractor was allowed to bring two employees into the jurisdiction of Local 6. Moreover, Breininger also noted that when an out-of-town contractor "comes in here, he is treated the same as local contractors according to this because he signs the agreement." (Deposition of Lynn L. Breininger at p. 39; R. 28). Petitioner submits that two other men were referred by respondent out of sequence of the union's job referral list to his detriment. (Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits at pp. 5 and 6, and Exhibit "C" thereto; R. 26).

Petitioner testified that he had filed charges with the International Union and that he had contacted the National Labor Relations Board only to be informed that the instant matter was a contract dispute and the NLRB did not handle that sort of claim. (J.A. 14, 15). Breininger also testified in his deposition that Mr. Nunally, one of the persons referred by the union to the Venderbush job of

sequence to the list, was a member of the "Concerned Brothers," Local 6 group that backed the administration of Duffey and Williams. (J.A. 19).

The most serious discrimination with respect to job referrals, according to Breininger, were those made by respondent to Bechtel Power Company on the Fermi job site. (J.A. 15-19, 22, 23). Petitioner testified that he had not worked at Bechtel and that the majority of those sent there on a repeated basis were members of the "Concerned Brothers" political group. (J.A. 15-18). The Concerned Brothers backed the then present administration and received special treatments while the other group was largely not working. (J.A. 18, 19). Petitioner added that one Don Reaume, an ex-business manager laid off in December of 1982, below Breininger on the out-of-work list, was sent to the Bechtel work site. (Deposition of Lynn L. Breininger at pp. 175-176; R. 28). Petitioner also testified that when a member worked for someone who was laid off, the member must have a letter of request to get back in. (Deposition of Lynn L. Breininger at p. 146; R. 28). In the litigation in District Court, petitioner had requested production of all written job requests. The first request dated chronologically is January 11, 1983, three years after the contract provision was placed into effect. None were submitted by Bechtel Power Company from January 11, 1983, through May 8, 1984. Moreover, no termination notices were produced by the respondent which pertained to members who worked in Bechtel Power Company. (Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits. Exhibit "C" thereto; R. 26).

With respect to petitioner's LMRDA claims, Breininger testified in deposition that he had participated in

handing out pencils for Don Reaume, the former business manager, and Bob Goode, former business agent. (J.A. 20, 21). Breininger also testified that Mr. Duffey was aware that Breininger was opposed to him politically. (Deposition of Lynn L. Breininger at pp. 185-191; R. 28).

In his Memorandum in Opposition to Motion for Summary Judgment, Mr. Breininger submitted a number of composite exhibits detailing the alleged discrimination. (See Opposition to Plaintiff's Motion filed 9/10/86 with Exhibits. Exhibits "A" through "I"; R. 26).

SUMMARY OF ARGUMENT

A union member who complains that his union arbitrarily, discriminatorily and/or in bad faith without reason or cause breached its statutory duty of fair representation to him by refusing to refer him to jobs on the out-of-work list, by refusing to honor an employer request for his employment, and by refusing to process charges related to the operation of a job referral list may bring an action in Federal District Court alleging a breach of the duty of fair representation. The Jurisdiction of the Federal District Court is concurrent with that of the National Labor Relations Board and is based upon 28 U.S.C. Section 1337; *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967); *Amalgated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). Nor is an allegation that an employer breached a collective bargaining agreement a precondition or a pre-

sequisite to a Federal Court's concurrent jurisdiction to hear duty of fair representation suits in cases alleging improper job referrals. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). The District Court, therefore, had jurisdiction to proceed to the merits of petitioner's duty of fair representation claims.

A Federal District Court has concurrent jurisdiction over a union member's claim that his union, in allegedly failing to refer him to jobs in retaliation for political opposition, violated the Labor Management Reporting and Disclosure Act. Such claims, involving job referrals, are not pre-empted by the National Labor Relations Board's jurisdiction. *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971). A union's operation of its job referral system to exclude a member from consideration for referrals can affect his rights as a member and can constitute "discipline" within the meaning of the LMRDA. Whether such exclusion rose to the level of "discipline" is an issue of fact for the trial court to determine.

———o———

ARGUMENT

A. A UNION MEMBER'S CLAIM THAT HIS UNION BREACHED ITS DUTY OF FAIR REPRESENTATION BY ENGAGING IN DISCRIMINATORY JOB REFERRALS MAY BE BROUGHT IN FEDERAL DISTRICT COURT IN AN ACTION INVOKING THE COURT'S JURISDICTION UNDER 28 U.S.C. SECTION 1337.

In the within case, petitioner had invoked the jurisdiction of the United States District Court for the Northern District of Ohio, Western Division pursuant to 28 U.S.C. Sections 1331, 1337, 1343(4), and 28 U.S.C. Sections 2201 and 2202. As to the first count of his First Amended Complaint, petitioner further alleged that his suit was brought pursuant to 29 U.S.C. Sections 151, 158(b) and 159, based on allegations of the breach of duty of fair representation. A careful reading of the first paragraph of petitioner's First Amended Complaint will reveal that when that document was filed in early 1984, petitioner specifically distinguished his lawsuit to note that his duty of fair representation claim was based on 28 U.S.C. Section 1337 and that it did not involve a breach of a collective bargaining agreement by an employer. (First Amended Complaint with Jury Demand; R. 4). This was petitioner's attempt to make it clear that this was not a "hybrid" Section 301 suit as is more prevalent in cases filed in District Courts. It is respectfully submitted that the United States Court of Appeals for the Sixth Circuit has erroneously decided in the within case that a union member who has alleged that his union breached its duty of fair representation by failing to refer him to jobs must bring that claim to the National Labor Relations Board. The Sixth

Circuit by its decision has divested union members of their rights to invoke the federal court's jurisdiction in order to supervise union conduct. In the within case petitioner Breininger alleged in his First Amended Complaint that the respondent's course of conduct was arbitrary, discriminatory and in bad faith without reason or cause. Moreover, the conduct complained of by petitioner Breininger in his First Amended Complaint went beyond the mere administration of a job referral list. Close examination of the First Amended Complaint, including paragraphs 7, 11, 12, and 13, reveals that Breininger's duty of fair representation claims involved the union's actual failure to honor an employer's letter of request as is set forth in the applicable collective bargaining agreement. (J.A. 29). Moreover, Breininger complained that despite the fact that he filed a charge under Article 18, Section 1 of the Constitution and Ritual Sheet Metal Worker's International Association with the respondent no action was taken at the time his First Amended Complaint was filed. In the court below, the Sixth Circuit held that the District Court lacked jurisdiction over petitioner's duty of fair representation's claims and cited *Local 100: Journeymen v. Borden,* 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963), for the proposition that the National Labor Relations Board has exclusive jurisdiction over claims of discrimination and job referrals. It is respectfully submitted that the Sixth Circuit's opinion is in conflict with other courts of appeals, other decisions of this court and other panels of the Sixth Circuit. In *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed.2d 842 (1967), this court held that since a union's duty, as exclusive agent, fairly to represent all members of a designated unit is based on federal stat-

utes, federal law governs the employee's cause of action for breach of that duty. In fact the statutory duty of fair representation was developed over forty (40) years ago in cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. See *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192, 655 S.Ct. 226, 89 L.Ed. 173 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944). This statutory duty of fair representation was soon extended to unions certified under the National Labor Relations Act. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). In *Vaca v. Sipes,* this court held that although the National Labor Relations Board had then recently held that a union's breach of its statutory duty of fair representation is an unfair labor practice under Section 8(b) of the National Labor Relations Act, it did not follow that the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), is applicable thereto. This court noted in *Vaca v. Sipes* that although Section 8(b) of the National Labor Relations Act was enacted in 1947, the National Labor Relations Board did not until *Miranda Fuel* interpret a breach of a union's duty of fair representation as an unfair labor practice. This court went on to note that the pre-emption doctrine has never been rigidly implied to cases where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board. See *Vaca v. Sipes, supra* at 386 U.S. 171. This court also noted that Congress has created numerous exceptions to the Board's exclusive jurisdiction.

In *Vcca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 171 L.Ed. 2d 842 (1967), this court also noted that a primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the Labor Relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable in cases involving alleged breaches of a union'sduty of fair representation. This court explained as follows at 386 U.S. at 181:

> The doctrine was judicially developed in Steele and its progeny, in suits alleging breach of the duty remain judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the board adopted and applied the doctrine as it had been developed by the gederal courts. (See 140 ULRB at 184-186). Finally, as the dissenting board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of their grievance machinery; as these matters are not normally within the board's unfair labor practice jurisdiction, it can be doubted whether the board brings substantially greater expertise to bear on these problems than do the courts , which have been engaged in this type of review since the *Steele* decision.

Moreover, as this court noted in *Vaca v. Sipes,* the collective bargaining system was encouraged by Congress and as administered by the National Labor Relations Board of necessity subordinates the interest of an individual employee to the collective interest of all employees of

the bargaining unit. A concern voiced by this court in *Vaca v. Sipes* is still paramount at this time in that if this court were to hold that courts are foreclosed from traditional supervisory decisions in claims alleging breaches of duty of fair representation the individual employee injured by arbitrary or discriminatory union conduct could "no longer be assured of impartial review of his complaint, since the board's general counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint". The public interest in effectuating the policies of the Federal Labor Laws, not the wrong done the individual employee, is always the board's principal concern in fashioning unfair labor practices. See *Vaca v. Sipes,* 386 U.S. 171 at 182 Footnote 8. Thus, this court noted that the existence of even a small group of cases in which the board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine and this court concluded that it could not assume from the National Labor Relations Board's tardy assumption of jurisdiction in these cases that Congress, when it enacted the NLRA Section 8(b), in 1947, intended to oust the courts of their traditional jurisdiction over claims of arbitrary conduct by the individual employee's statutory representative.

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), this court explained that actions seeking damages for breach of a union's duty of fair representation exist concurrently with the National Labor Relations Board's remedies.

Moreover, in *Communication Workers of America v. Beck*, — U. S. —, 108 S.Ct. 2641 (1988), this court held that Federal Courts may resolve unfair labor practice questions that emerge as collateral issues and suits brought under independent federal remedies. The court specifically noted that one remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. The court noted that the Federal Court's jurisdiction to adjudicate fair representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well. See also *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

In the within case as set forth above, petitioner alleged in his First Amended Complaint that "in refusing to honor employer requests for plaintiff's employment, and refusing to properly administer the job seniority list and in refusing to process and/or acknowledge these charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorily and/or in bad faith and/or without reason or cause. (See First Amended Complaint; R. 4). It is submitted that the existence of an independent remedy for breach of duty of fair representation has been well settled by this court and that plaintiff's complaint properly sets forth a claim for breach of duty of fair representation in the union's administration of the contract and in the union's failure to process its own internal grievance procedure with respect to plaintiff's claims. Therefore, it is respectfully submitted that the District Court and the Sixth Circuit's decision holding declining jurisdiction were erroneous.

Other courts of appeals and other panels of the Sixth Circuit have agreed that fair representation of claims are not within the National Labor Relations Board's exclusive jurisdiction. See e.g. *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985); *Journeymen Pipefitters Local 392 v. NLRB*, 712 F.2d 225, 228-229 (6th Cir. 1983); *Lewis v. Local Union No. 100 of Laborers International Union of North America*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); *In re: Carter*, 612 F.2d 1093, 1104 (5th Cir. 1980); *Beriault, Local 40 Super Cargoes and Checkers*, 501 F.2d 258, 263-265 (9th Cir. 1974); *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741, 745-749 (5th Cir. 1974). In the within case the Sixth Circuit appears to stand alone, holding that a properly pleaded fair representation claim is preempted by the National Labor Relations Act and its suggestion that other cases support its decision is based upon inapposite authority.

It is respectfully submitted in that petitioner's complaint stated a fair representation claim that the district court had jurisdiction under 28 U.S.C. Sections 1331 and 1337 to proceed to the merits. Since the collective bargaining agreement in the within case established a referral system for employment for members of the bargaining unit, respondent's operation of that system represented the administration of the collective bargaining agreement thus rendering its operation of the referral system arguably within the scope of the union's duty of fair representation.

The National Labor Relations Board and Courts of Appeals have held that a union breaches its duty of fair

representation to members of the bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an exclusive hiring hall referral system. *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir. 1971); *Pipe Fitters Local 392 (Kaiser Engineers),* 252 NLRB 417, 421-422 (1980). In the within case, the district court found that the referral system was non-exclusive. (Opinion and Order filed 2/20/87; R. 29). However, the district court's opinion based its finding on the fact that the record shows that union *members* possessed alternative methods in order to obtain employment. In fact the respondent in contending that the referral system was non-exclusive contended in the district court that *members* of the respondent had several options through which to obtain employment. (J.A. 43, 44, 45). Moreover, in his affidavit which was annexed as an exhibit to Respondent's Motion for Summary Judgment in the District Court, David Williams, then business manager for the respondent, noted that the respondent's referral service "was non-exclusive since a *member* of the union seeking employment as a sheet metal worker can obtain employment through any of the following ways . . ." (J.A. 54-58).

Although the respondent has attempted to label this system as "non-exclusive", there is no showing in the record and the district court did not reach the issue of whether the referral system operated by respondent was available to non-union members as well as union members. It is respectfully submitted that the district court's finding that the referral system was non-exclusive and the Sixth Circuit's finding that "hiring all referrals are not a function of union membership since referrals are available to members as well as non-mem-

bers" are not supported by the record as the respondent's contentions as to the non-exclusivity of the referral system reached only the issue of whether a union member was required to seek employment only through the out-of-work list. (See generally Deposition of Michael Duffey filed 11/19/86; R. 24; Deposition of David Williams filed 11/19/86; R. 25).

In his deposition which is filed with the district court, David Williams, then the business manager for the respondent, testified that a member of Local 6 was required to have an introductory card before he went to work regardless of whether he sought his own employment through a local contractor or not. (Deposition of David Williams filed 11/19/86, p. 29; R. 25). A referral system is considered exclusive "if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time or to a specified percentage of the work force". *Carpenter's Local 608 (various employers),* 279 NLRB 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2nd Cir. 1987), *cert. denied* — U.S. — (1987). In the present case, the collective bargaining agreement provides that the employer may hire sufficient men to man his work if the union cannot furnish same within a period of 48 hours after their request. (J.A. 29). Moreover, in his deposition Michael Duffey, former officer of the respondent, testified that even if the union member was requested by a contractor an introductory card was provided by the respondent. (Deposition of Michael Duffey filed 11/19/86, pp. 78, 79; R. 24). It is respectfully submitted that based on the record before the District Court it was not established by the respondent that its referral systems were non-exclusive. Therefore, any remand by this court should address this issue and

instruct the District Court to redetermine the issue of whether the respondents maintained an exclusive or non-exclusive referral system based on applicable law.

However, even if the referral system were non-exclusive, it should be noted that the National Labor Relations Board has held that a union operating a non-exclusive referral system violates Section 8(b)(1)(a) of the NLRA if it refuses to refer an employee because of the employee's exercise of rights protected by Section 7, 29 U.S.C. Section 157. *Chauffeur's Union, Local 923 (Yellow Cab)*, 172 NLRB 2137 (1968); *Hoisting and Portable Engineers, Local 4 (Carlson Corp.)*, 189 NLRB 366, 367 (1971), enforced, 456 F.2d 242 (1st Cir. 1972). The National Labor Relations Board has not, as of the present time, ruled directly on whether such conduct would also violate the union's duty of fair representation but the substantive issues would be matters to be addressed to the lower court on remand.

B. A UNION MEMBER WHO CLAIMS THAT HIS UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION BY ENGAGING IN DISCRIMINATORY JOB REFERRALS MAY MAINTAIN AN ACTION AGAINST HIS UNION IN FEDERAL DISTRICT COURT NOTWITHSTANDING THE ABSENCE OF AN AFFIRMATIVE ALLEGATION THAT AN EMPLOYER BREACHED A COLLECTIVE BARGAINING AGREEMENT.

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), this court noted at 403 U.S. at 299:

> . . . indeed, in *Vaca v. Sipes*, 386 U.S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

See also *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974).

The internal conflict within the Sixth Circuit is highlighted by reviewing *Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985), wherein the Sixth Circuit held that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of Federal District Courts even when there is no accompanying claim under Section 301 for breach of contract. In *Storey, supra*, the Sixth Circuit adopted the jurisdictional view of the issue and specifically embraced the 5th Circuit view in *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974). See also *Lewis v. Local Union No. 100 of Laborers International Union of North America*, 750 F.2d 1368 (7th Cir. 1984).

It is respectfully submitted in holding that corresponding breach of a collective bargaining agreement is a precondition to suit for duty of fair representation, the Sixth Circuit's decision was erroneous and in conflict with its own authority, other Circuits and this court.

C. A UNION'S DISCRIMINATORY REFUSAL TO REFER ITS MEMBER TO JOBS CONSTITUTES "DISCIPLINE" WITHIN THE MEANING OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT AND A UNION MEMBER'S CLAIM BROUGHT PURSUANT TO THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT DEALING WITH DISCRIMINATORY JOB REFERRALS IS NOT PRE-EMPTED BY THE JURISDICTION OF THE NLRB.

In its *per curiam* opinion filed March 1, 1988, the United States Court of Appeals for the Sixth Circuit held in part that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB and that, therefore, petitioner's claim pursuant to 29 U.S.C. Sections 411(a)(5), 412, and 529 (Labor Management Reporting and Disclosure Act) was pre-empted by the Board's exclusive jurisdiction. It is respectfully submitted that the Sixth Circuit's pre-emption analysis relative to petitioner's LMRDA claim is misguided. In *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971), this Court rejected the union's argument that because the suit involved a claim that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction (401 U.S. at 239).

Moreover, Courts of Appeals have uniformly concluded that LMRDA claims are not pre-empted and that claims alleging violations of rights granted under the LMRDA are cumulative to those granted under the National Labor Relations Act. See *Schmid v. United Brotherhood of Carpenters and Joiners of America*, 773 F.2d 993 (8th Cir. 1985); *Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984); *Vandeventer v. Local Union No. 513 of the International Union of Operating Engineers*, 579 F.2d 1373 (8th Cir.), *cert. denied*, 439 U.S. 984 (1978); *Keene v. International Union of Operating Engineers, Local 624*, 569 F.2d 1325 (5th Cir. 1978). It is respectfully submitted that the Sixth Circuit's decision was erroneous in this regard.

In its March 1, 1988 opinion, the United States Court of Appeals for the Sixth Circuit also held that petitioner's LMRDA claim was without merit because he did not demonstrate that he was improperly "disciplined." Section 101(a) of the LMRDA. 29 U.S.C. of 411(a) establishes a "Bill of Rights" for union members. Among those rights is a right to specified procedural due process before one is "fined, suspended, expelled or otherwise disciplined" by a union. (29 U.S.C. Section 411(a)(5)). Under Section 102 of the LMRDA, 29 U.S.C. Section 412, a person whose rights have been infringed by a violation of Section 101 may seek relief in a Federal District Court. Section 609 of The Act. 29 U.S.C. Section 529 also makes it unlawful for a union to "fine, suspend, expel or otherwise discipline" any of its members for exercising any rights he is entitled to under the provisions of the LMRDA. Petitioner's First Amended Complaint cited all of the above provisions and alleged that the respondent Union "disciplined" him for his political activities by discriminating against him in job referral.

In its March 1, 1988 opinion, the Sixth Circuit held that petitioner's LMRDA claim must fail because petitioner did not demonstrate that he was improperly disciplined. Applying *Finnegan v. Leu*, 456 U.S. 431 (1982),

the Court held that the term "discipline" was meant to refer only to punitive actions diminishing membership rights. The Sixth Circuit reasoned that the LMRDA's Bill of Rights was intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment. The Sixth Circuit noted that since hiring hall referrals were not a function of union membership since referrals were available to non-members as well as members, discrimination in the referral system because it did not breach the employee's union membership rights did not constitute "discipline" within the meaning of the LMRDA. In *Finnegan v. Leu*, 456 U.S. 431 (1982), this Court held that discharges from *appointed* policy-making decisions are exempt from the LMRDA. In *Sheet Metal Workers International Association v. Lynn*, 488 U.S. —, 109 S.Ct. —, 102 L.Ed.2d 700 (1989), this Court held that *elected* union officials may not be discharged on the basis of their protected political activity. In the within case, petitioner was a long time union rank and file member. It is respectfully submitted that the considerations supporting the Court's determinations in *Finnegan v. Leu* are not applicable given the fact that petitioner is a rank and file union member.

In *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114 (1985), *cert. denied*, 475 U.S. 1017 (1986), a different panel of the Sixth Circuit held that a union's action in foreclosing a member's participation in a work referral program was an action which set him apart from other members in good standing. Such a sanction, in the words of the Sixth Circuit, unquestionably affected the member's membership rights. In his

First Amended Complaint and in evidence submitted to the District Court, petitioner demonstrated that he had been systematically excluded from job referrals, particularly those to the Bechtel Power Company's Fermi job site. As set forth in this brief, *supra*, the District Court's and the Sixth Circuit's findings that the referral list was "non-exclusive" is based on evidence in the record that union *members* are not excluded from obtaining their own jobs from in-town contractors. However, letters of requests from contractors and introductory cards were required. The record does not show that the referral system was available to non-union employees. Moreover, with respect to out-of-town contractors the referral system was operated, *de facto*, especially with regard to Bechtel Power Company so that the union had complete control over members sent to Bechtel.

There exists a triable issue as to whether the referral system was exclusive and/or as to whether the respondent's activities with respect to job referrals, whether the system was exclusive or not, rose to the level of "discipline."

Alternatively, even if the retaliation for intra union political activity alleged by petitioner is found not to constitute "discipline", it is respectfully submitted that it should remain actionable under Section 102 as an "infringement" of petitioner's rights under Section 101(a)(2) of the LMRDA based upon principles of notice pleading and petitioner's invocation of jurisdiction under Section 102 and the LMRDA.

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CONCLUSION

Petitioner Breininger respectfully requests that this Court reverse the Sixth Circuit's decision filed March 1, 1988, in all regards and remand this cause for further proceedings on the merits to the United States District Court for the Northern District of Ohio, Western Division.

Respectfully submitted,

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